

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
October 16, 2002 Session

J. MARK SMITH v. STATE OF TENNESSEE

Direct Appeal from the Claims Commission
No. 204-807 John Hicks, Administrative Judge

No. W2002-00874-COA-R3-CV - Filed December 30, 2002

The plaintiff in this case filed a complaint with the Tennessee Claims Commission pursuant to Tenn. Code Ann. § 9-8-307. The claim alleged negligence on the part of a state trooper at an accident scene on a state highway. The Claims Commission determined that it did not have jurisdiction over the claim and accordingly awarded summary judgment to the State. We reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Claims Commission Reversed

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY K. LILLARD, J., joined.

Farrell A. Levy, Knoxville, Tennessee, for the appellant, J. Mark Smith.

Paul G. Summers, Attorney General & Reporter, Michael E. Moore, Solicitor General and Michael B. Leftwich, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

The facts relevant to our consideration of this appeal are undisputed. On January 26, 1992, at approximately 4:30 AM, a vehicle operated by Mr. Franklin D. Page (Mr. Page) veered off the southbound lane of Route 202 in Decatur County, crossed into the northbound lane, and ran off the east side of the road and down an embankment into a wooded area. The scene of the accident was north of a curve in the highway. Mr. Page got out of the car, walked up the road to a friend's home, and called the Decatur County Sheriff's Office to report the accident. Mr. Page asked the Sheriff's Department to send Jerry Smith's wrecker service to the scene of the accident.

Sheriff's Deputy Michael Moncher was dispatched to the scene, and parked facing north in the north-bound lane of the highway. Approximately five minutes later, Mr. Page returned to the scene with his friends, the Thomases. The Thomases parked their car on the east edge of the north-bound lane, leaving the emergency flashers on. Deputy Moncher directed Mr. Page to sit in his patrol car. State Trooper Van Holcomb (Trooper Holcomb) arrived a few minutes later, as did the

wrecker operated by Jerry Smith and his son, Mark Smith. Trooper Holcomb approached the scene from the north, heading south in the south-bound lane. When he arrived at the scene, he pulled into the north-bound lane, still facing south. Trooper Holcomb had on his flashing blue lights, emergency flashers, and headlights.

Deputy Moncher provided Trooper Holcomb with the information gathered to that point. Trooper Holcomb administered a field sobriety test to Mr. Page, placed him under arrest, and seated him in the back seat of his patrol car. Leaving the lights, flashers and flashing blue takedown lights on, Trooper Holcomb went to the front of his car and began to diagram the accident. Trooper Holcomb told the Smiths they could hook the Page vehicle up to the wrecker, but otherwise did not direct the Smiths' movement of the Page vehicle. The wrecker was also well lighted and had a large orange light rotating on top.

The Smiths had attached the Page vehicle to the wrecker and were pulling the vehicle out of the ditch when Deputy Moncher was called to the scene of a burglary. As Deputy Moncher was traveling south, he encountered a tractor trailer heading north in the north-bound lane. The tractor trailer was owned by Mack Creasy and operated by Joe Anderson. Deputy Moncher flashed his lights in order to warn the driver of the tractor trailer of the danger ahead. The tractor trailer proceeded toward the accident scene without slowing or stopping and collided with the wrecker as it was pulling the Page vehicle onto the road. At the moment of collision, the wrecker was moving across the road into the southbound lane and pulling the car into the northbound lane. Jerry Smith drove the wrecker, while Mark Smith was outside the vehicle. The collision knocked the Page car from the wrecker, and the car struck both Mark Smith and Trooper Holcomb, who had stepped forward to warn the Smiths that the tractor trailer was approaching. Trooper Holcomb was killed. Mark Smith sustained serious injuries resulting in permanent disability.

Mark Smith filed suit against the State of Tennessee ("the State") with the Tennessee Claims Commission (the "Claims Commission") pursuant to Tenn. Code Ann. § 9-8-307(a)(1) on May 13, 1993, alleging negligence on the part of Trooper Holcomb. In his complaint, Mark Smith alleges:

At all times hereunder, Trooper Holcomb was in charge of properly securing the accident scene and directing the manner, method, and time of removing the automobile that had previously wrecked. Because of the location of the vehicle that had previously wrecked, it was necessary to block both lanes of Tennessee Route 202 in order to safely and properly move the vehicle that had previously wrecked. Trooper Holcomb directed when the vehicle was to be removed from the scene.

Smith alleges Trooper Holcomb was negligent in that he:

Failed to properly secure the scene of the accident to avoid further accidents;
Inadequately warned approaching motorists;
Obstructed traffic, failed to place warning devices, i.e., triangles or flares before the curve;

Undertook to obstruct traffic at a dangerous place in the roadway when the exercise of reasonable care and prudence required at least two squad cars to secure the scene, or alternatively, to postpone the towing of the Page vehicle until daylight hours when the scene could properly be secured so as to avoid an accident involving approaching motorists; and,
Failed to exercise due care under the then existing circumstances.

The State answered the complaint asserting as affirmative defenses that (1) Mark Smith failed to state a claim upon which relief can be granted and (2) that relief is barred under the doctrine of comparative negligence on the basis that other persons, including Joe Anderson and Mack Creasy, were the proximate cause of damages.

The Claims Commission determined that it did not have jurisdiction under Tenn. Code Ann. § 9-8-307(a)(1)(E) or Tenn. Code Ann. § 9-8-307(a)(1)(F). On March 13, 2002, the Claims Commission awarded summary judgment to the State and dismissed the claim. Mark Smith appeals this determination to this Court.

Issues

The issue presented by Mark Smith (hereinafter referred to as Mr. Smith) is whether the Tennessee Claims Commission has jurisdiction over his claim under any of the following subsections of Tenn. Code Ann. § 9-8-307(a)(1):

Tenn. Code Ann. § 9-8-307(a)(1)(A): negligent operation or maintenance of any motor vehicle

Tenn. Code Ann. § 9-8-307(a)(1)(C)): negligently created or maintained dangerous conditions on state controlled real property

Tenn. Code Ann. § 9-8-307(a)(1)(E): negligent care, custody and control of persons

Tenn. Code Ann. § 9-8-307(a)(1)(F): negligent care, custody or control of personal property

Tenn. Code Ann. § 9-8-307(a)(1)(J): dangerous conditions on state maintained highways.

Standard of Review

Summary judgment should be awarded when the moving party can demonstrate that there are no genuine issues regarding material facts of the cause of action and that it is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). Mere assertions

that the nonmoving party has no evidence does not suffice to entitle the movant to summary judgment. *McCarley*, 960 S.W.2d at 588. The moving party must either conclusively demonstrate an affirmative defense or affirmatively negate an element which is essential to the nonmoving party's claim. *Id.* If the moving party can demonstrate that the non-moving party will not be able to carry its burden of proof at trial on an essential element of its case, summary judgment is appropriate. *Id.*

When a party makes a properly supported motion for summary judgment, the burden shifts to the nonmoving party to establish the existence of disputed material facts or that the moving party is not entitled to summary judgment as a matter of law. *Id.*; *Staples v. CBL & Assocs.*, 15 S.W.3d 83, 89 (Tenn. 2000). The nonmoving party cannot merely rely on the pleadings, but must demonstrate that essential elements of a claim exist by: 1) pointing to evidence that creates a factual dispute; 2) re-enforcing evidence challenged by the moving party; 3) offering additional evidence which establishes a material dispute; 4) submitting a Tenn. R. Civ. P. 56.06 affidavit explaining the need for additional time for discovery. *McCarley*, 960 S.W.2d at 588.

We review an award of summary judgment *de novo*, with no presumption of correctness afforded to the trial court. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002). In determining whether to award summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party. *Staples*, 15 S.W.3d at 89. Summary judgment should be awarded only when a reasonable person could reach only one conclusion based on the facts and inferences drawn from those facts. *Id.* If there is any doubt about whether a genuine issue exists, summary judgment should not be awarded. *McCarley*, 960 S.W.2d at 588.

As a sovereign, this State is immune from suit except as it so consents. *Stewart v. State of Tennessee*, 33 S.W.3d 785, 790-91 (Tenn. 2000)(internal cites omitted). In Tenn. Code Ann. § 9-8-301 *et seq.*, the General Assembly has established the parameters within which certain monetary claims against the state may be brought. *Id.* at 791. The Tennessee Code provides that jurisdiction to hear such claims is vested exclusively with the Tennessee Claims Commission and is limited only to the claims enumerated in section 9-8-307(a). *Id.* The General Assembly further has stated its intent that “the jurisdiction of the claims commission [is to] be liberally construed to implement the remedial purposes of this legislation.” *Id.*

When construing a statute, courts must seek to effectuate the purpose of the legislature. *Stewart*, 33 S.W.3d at 791. Liberal construction of a statute does not authorize the courts to create a right or to extend it beyond the obvious intent of the legislature. *Id.* When construing a statute liberally, we are required to “give ‘the most favorable view in support of the petitioner’s claim.’” *Id.* (quoting *Brady v. Reed*, 212 S.W.2d 378, 381 (Tenn. 1948)). We accordingly liberally hold in favor of jurisdiction as long as “(1) the particular grant of jurisdiction is ambiguous and admits of several constructions, and (2) the ‘most favorable view in support of the petitioner’s claim’ is not clearly contrary to the statutory language used by the General Assembly.” *Id.*

Jurisdiction of the Claims Commission

Part 3 of Title 9, chapter 8 of the Tennessee Code provides for the establishment of the Tennessee Claims Commission. Tenn. Code Ann. § 9-8-307 as operative in 1993, provides, in pertinent part:

(a)(1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state falling within one (1) or more of the following categories:

(A) The negligent operation or maintenance of any motor vehicle

. . . .

(C) Negligently created or maintained dangerous conditions on state controlled real property. The claimant under this subsection must establish the foreseeability of the risks and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures;

. . . .

(E) Negligent care, custody and control of persons;

(F) Negligent care, custody or control of personal property;

. . . .

(J) Dangerous conditions on state maintained highways. The claimant under this subsection must establish the foreseeability of the risk and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures;

Tenn. Code Ann. § 9-8-307 (1999).

Tennessee Code Annotated § 9-8-307(a)(1)(A)

Mr. Smith asserts that the Claims Commission has jurisdiction to adjudicate his claim under § 9-8-307(a)(1)(A) because the accident causing his injuries was caused by Trooper Holcomb's negligent operation of his vehicle. Mr. Smith cites *Bradam v. State*, 235 S.W.2d 801 (Tenn. 1950), for the proposition that operation of a vehicle includes more than merely driving it. Mr. Smith contends that Trooper Holcomb negligently operated his vehicle when he parked it facing south in the northbound lane and left his headlights and takedown light activated. He refers the Court to the affidavit of Dr. J. Larry Williams, an accident reconstruction expert, who stated:

[T]he primary cause of this accident was Trooper Van Holcomb parking his police cruiser in the wrong lane of traffic with the cruiser's takedown light operating This light was shining in the direction from which the truck driven by Joe Anderson was coming. Because of the height and brightness of the light, any motorist coming from the direction Joe Anderson was traveling would be blinded.

The State contends that the Claims Commission is without jurisdiction to adjudicate Mr. Smith's claim under Tenn. Code Ann. § 9-8-307(a)(1)(A) because Trooper Holcomb was not operating his vehicle when the accident causing Mr. Smith's injury occurred. The State recognizes that courts have considered "the operation of a motor vehicle" to mean something more than driving. The State asserts, however, that no cases have considered someone to be operating a motor vehicle when that person was outside of the vehicle. The State's argument, as we understand it, is that since Trooper Holcomb was standing outside of his car when the accident occurred, he cannot be deemed to have been operating the vehicle. We disagree.

The Tennessee Supreme Court first considered the difference between the words "operating" and "driving" in context of the penal statutes in *Bradam v. State*, 235 S.W.2d 801. In *Bradam*, the Court opined that operating constitutes more than mere driving. *Id.* at 802-803. The *Bradam* Court held that unlawful operation of a motor vehicle in a wonton, reckless and careless manner would include leaving a truck on a traveled portion of a highway at night without leaving on any lights. *Id.* at 803. Although the driver in *Bradam* was in fact inside the parked motor vehicle when the accident occurred, we do not believe this was a consideration in the reasoning of the Court. The Court held that driving the vehicle, parking it on the roadway, and leaving it parked without lights constituted operation and stated, "[s]uch an act under the circumstances charges a reasonable, prudent person with appreciation of the fact and the anticipation of consequences injurious or fatal to others." *Id.*

We believe the reasoning of *Bradam* applies to the case now before this Court. Regardless of whether he was inside of the vehicle when the accident occurred, operation of the vehicle by Trooper Holcomb resulted in the condition and placement of the vehicle at the time of the accident causing injuries to Mr. Smith. Since such an interpretation of the word "operation" is not clearly contrary to the intent of the statute as enacted by the General Assembly, we must view Mr. Smith's claim in the light most favorable in support of jurisdiction. *Stewart*, 33 S.W.3d 785, 791 (Tenn. 2000). We accordingly hold that the Claims Commission has jurisdiction under Tenn. Code Ann. § 9-8-307(a)(1)(A) to adjudicate whether Trooper Holcomb's operation of the vehicle was negligent and, if so, whether it was the proximate cause of Mr. Smith's injuries.

Tenn. Code Ann. § 9-8-307(a)(1)(C) and (J)

When interpreting a statute, courts must construe the various provisions of the statute together in such a way as to not render any one provision inoperative or superfluous. *Id.* at 795. Subsection (C) and subsection (J) of § 9-8-307(a)(1) are virtually identical, with subsection (C) applying to conditions on state owned real property and subsection (J) applying to state maintained highways. To read subsection (C) as pertaining to state maintained highways would render subsection (J) superfluous, and we accordingly decline to do so.

Our consideration of whether the Claims Commission has jurisdiction to adjudicate this claim under subsection (J) requires us to determine whether this incident presents the type of "dangerous condition" envisioned by the General Assembly. The State contends that this subsection

applies only to the physical condition of the roadway. As the State asserts, cases where jurisdiction has been found under subsection (J) historically have involved a question of the physical condition of the roadway, including traffic control measures. *See, e.g., Sweeney v. State*, 768 S.W.2d 253 (Tenn. 1989). However, in light of the aforementioned legislative mandate that Tenn. Code Ann. § 9-8-307 be liberally construed, we decline to hold that subsection (J) should be interpreted as narrowly as urged by the State in all cases. Nevertheless, as stated above, the circumstances created by Trooper Holcomb's vehicle are properly adjudicated under subsection (A). Further, we believe the conditions created by the location of the wrecker are properly considered under subsection (F), rather than under subsection (J). We accordingly agree with the State that subsection (J) is inapplicable in this case.

Tennessee Code Annotated § 9-8-307(a)(1)(E) and (F)

Mr. Smith's argument, as we perceive and summarize it, is that as the law enforcement officer in control of the scene of the accident at the time Mr. Smith was injured, Trooper Holcomb had a duty to control the scene, which included a duty to control the wrecker and the manner in which the Smiths operated their wrecker, and that he was negligent in this duty. The State asserts that Trooper Holcomb had no duty to control how the Smiths did their work and that he did not assume such a duty. The State further asserts that while Trooper Holcomb told the Smiths that they could begin towing the vehicle, he never told them how to do their job. The State cites *Stewart, supra*, for the proposition that Trooper Holcomb had no such duty.

In *Stewart*, the Supreme Court noted that liability may be imposed under § 9-8-307(a)(1)(E) for "injuries to third persons caused by those persons for whom the state has responsibility." *Stewart*, 33 S.W.2d at 792. The *Stewart* Court then addressed the question of whether a state highway patrol officer, Trooper Ray, had a duty or had assumed a duty to direct or control the actions of local police authorities where a local deputy was injured. The Court held that Trooper Ray neither had nor had assumed such a duty. *See id.* at 793-94. In so holding, the Court stated, "the imposition of a legal duty 'reflects society's contemporary policies and social requirements concerning the right of individuals and the general public to be protected from another's act or conduct.'" *Id.* at 793 (quoting *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 894 (Tenn. 1996)).

We believe that the issue presented by this unique set of facts is whether Trooper Holcomb had a duty to control the operation of the wrecker to protect the wrecker operators themselves from their own conduct, where the operators were familiar with the area and conditions in which they were working. The law imposes no such duty. Additionally, upon review of the record before us, and noting Jerry Smith's statement in his deposition that Trooper Holcomb offered no instructions regarding how to operate the wrecker, we agree with the State that Trooper Holcomb did not assume this duty. We therefore affirm summary judgment for the State with respect to subsections (E) and (F).

Conclusion

The Claims Commission has jurisdiction to adjudicate this claim under Tenn. Code Ann. § 9-8-301(a)(1)(A). Summary judgment for the State accordingly is reversed. This case is remanded for further proceedings consistent with this opinion. Costs of this appeal are taxed to the appellee, the State of Tennessee.

DAVID R. FARMER, JUDGE